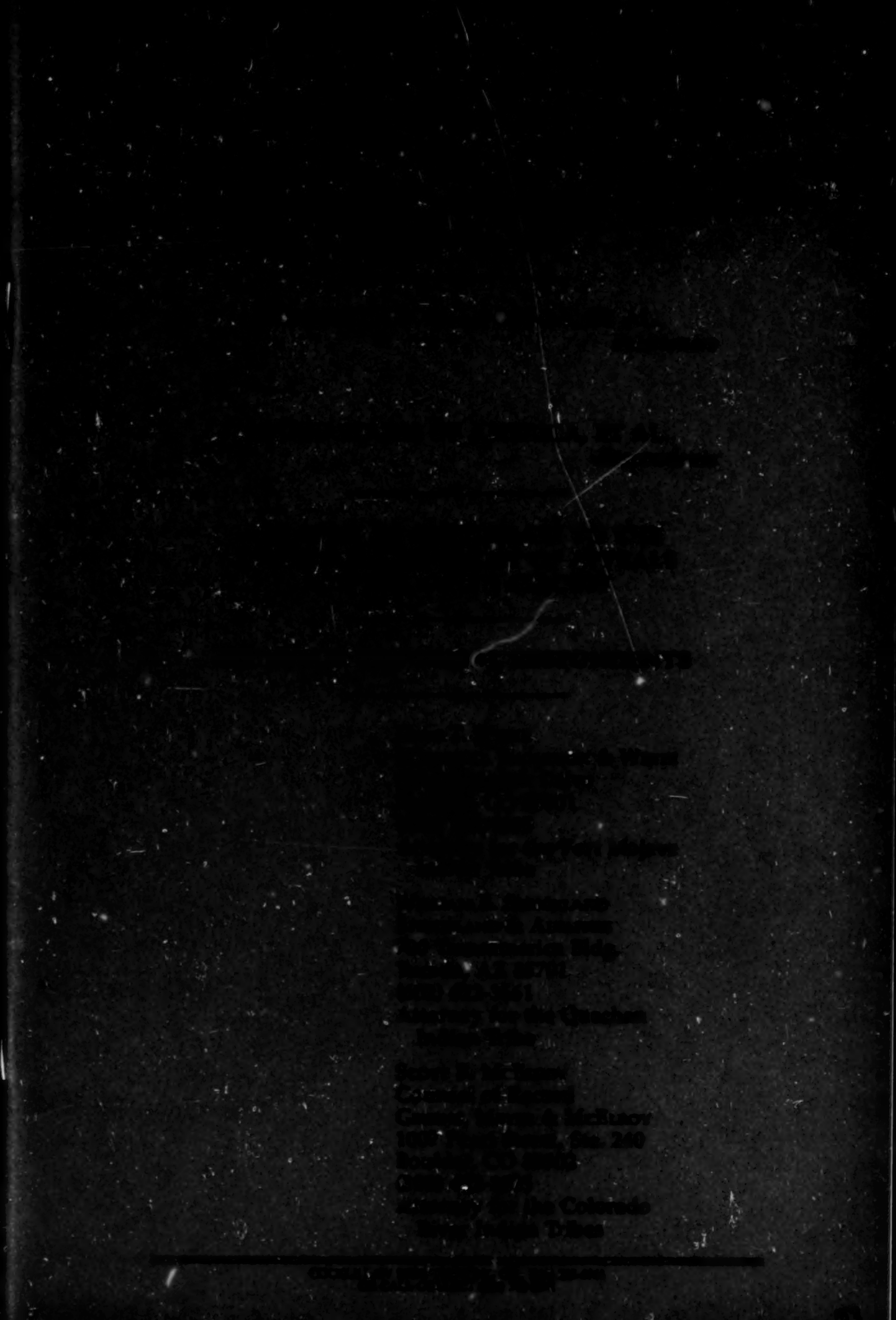

QUESTIONS PRESENTED

(1) Whether the States of Arizona and California and public agencies of the State of California who are before this Court in *Arizona v. California*, 373 U.S. 546 (1963), 460 U.S. 605 (1983), may invoke the jurisdiction of the federal district court under the Administrative Procedure Act, 5 U.S.C. § 702, to challenge the United States' claim that it holds lands in trust for the benefit of Indian tribes in light of Congress' express refusal in the Quiet Title Act, 28 U.S.C. § 2409a, to waive the sovereign immunity of the United States in suits to adjudicate disputed title to "trust or restricted Indian lands" and the APA's express provision that it does not authorize suit if "any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

(2) Whether the United States' intervention and waiver of immunity in *Arizona v. California* extends to an entirely separate federal district court action brought by state agencies against the United States to challenge the United States' claim that it holds lands in trust for the benefit of an Indian tribe.

(3) Whether in order to invoke the "Indian lands exception" to the Quiet Title Act, the United States must demonstrate a "substantial possibility" that the lands in question are trust or restricted Indian lands.

LIST OF PARTIES

The parties to the proceedings below were:

Petitioners the State of California, the State of Arizona, the Metropolitan Water District of Southern California and the Coachella Valley Water District.

Respondents the United States of America, Donald P. Hodel, the Secretary of the Interior, the Quechan Indian Tribe, the Fort Mojave Indian Tribe and the Colorado River Indian Tribes.

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No. 87-1165

In The

Supreme Court of the United States

October Term, 1987

THE STATE OF CALIFORNIA, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE TRIBAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported as *Metropolitan Water District of Southern California v. United States,* at 830 F.2d 139 (9th Cir. 1987). The opinion of the district court (Pet. App. 12a) is reported as *Metropolitan Water District of Southern California v. United States,* at 628 F. Supp. 1018 (S.D. Cal. 1986).

JURISDICTION

The judgment of the court of appeals was entered on October 14, 1987, and the petition for a writ of certiorari was filed on January 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

(1) Administrative Procedure Act, 5 U.S.C. § 702

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(2) Quiet Title Act, 28 U.S.C. § 2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or

water rights. This section does not apply to trust or restricted Indian lands, nor does it apply to or affect actions which may be or could have been brought under section 208 of the Act of July 10, 1952 (43 U.S.C. § 666).

(3) McCarran Amendment, 43 U.S.C. § 666

(a) Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. . . .

STATEMENT OF THE CASE

This action concerns the lingering boundary disputes arising from the water rights proceeding in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona v. California I*) and *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona v. California II*). At issue is the validity of three orders issued by the Secretary of the Interior establishing portions of the boundaries of the Fort Mojave, Colorado River, and Fort Yuma (Quechan) Indian Reservations. The Secretary's orders directed that portions of the Reservation boundaries be resurveyed with the result that additional lands were included within the original reservation boundaries. The lands affected were formerly held as public lands and are now held in trust for the benefit of the Tribes. Petitioners, the Metropolitan Water District of Southern California, the Coachella Valley Water District, the State of Arizona and the State of California (hereinafter "the State Parties") are parties to the *Arizona v. California* proceedings and are attempting to use this action as a vehicle to challenge the Secretary's boundary orders.

Thus far, the only Secretarial order that has been directly addressed in this litigation is the order affecting the Fort Mojave Reservation boundary. That order, issued in 1974 by Secretary Rogers C. B. Morton, directed a resurvey of the "Hay and Wood" portion of the Fort Mojave Reservation (hereinafter "the Reserve"). Secretary Morton was attempting to resolve a longstanding dispute within the Interior Department as to the correct location of the Reserve's western boundary. *Report*, Special Master Elbert P. Tuttle, No. 8, 58-59 (Feb. 22, 1982). (Hereinafter "Tuttle Report"). The source of the dispute was the original survey of the Reserve conducted in 1869 by Lt. George Wheeler which contained conflicting survey calls.[1] The survey's legal description referred to posts "near the left bank of the Colorado River" and, at the same time, set out courses, distances and acreage describing the Reserve as containing "9114.81 acres more or less".[2] If the courses, distances and acreage are followed,

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[1] Wheeler's original purpose was to establish the boundaries of a U.S. Military Post which was formally established by Executive Order in 1870. In 1890, the Post was made part of the Fort Mojave Indian Reservation by Executive Order and the Wheeler plat, and legal description, were adopted to describe this new portion of the Fort Mojave Indian Reservation. The Hay and Wood Reserve (an area used for growing hay and wood) was a part of the Post. (Pet. App. 14a).

[2] A copy of the 1870 Executive Order is Exhibit 4 to the Second Amended Compliant and is reproduced on pages 65-71 of the Excerpts of Record before the United States Court of Appeals for the Ninth Circuit. Hereinafter, all references to the Excerpts of Record will be to "E.R. ___". References to other documents will be to the Trial Court Docket Number, "N.R.".

the western boundary of the Reserve is located west of the 1869 River up into the foothills. On the other hand, setting the western boundary at the River as it existed in 1869 creates a Reserve of 5,614 acres.

Secretary Morton resolved the conflict by deciding that the correct location of the Reserve was according to the courses, distances and acreage, making the Reserve the full 9114.81 acres. He vacated a prior resurvey of 1928 and stated that the western boundary is "most accurately determined and established in accordance with the intent of the original survey by using the courses, distances and acreage as described in the plats and notes of the survey." E.R. 75.[3] In compliance with the federal resurvey statute (43 U.S.C. § 772) the Secretary provided for the protection of "third-party interests" owning "lands inside the now recognized boundary of the reservation". E.R. 76.[4]

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[3] The Secretary's decision was based upon consideration of a memorandum of that same date submitted by the Solicitor of the Department of the Interior and three memoranda submitted by the Associate Solicitor for Indian Affairs. Attorneys representing the Bureau of Land Management participated in the decision-making process. E.R. 77-78.

[4] Third parties within the surveyed area were in fact notified. Protests were then made by alleged patentees of land within the disputed area. These objections were overruled and the final plat was approved and filed on November 6, 1978. Memorandum and Report on preliminary Matters, Special Master Elbert P. Tuttle, No. 8. p. 33 (August 28, 1979). Metropolitan was not formally notified of the resurvey since, as it concedes (Pet. Br. at 10), it claims no lands or title interest to the resurveyed lands.

Following the Secretary's decision, the Tribe executed a twenty-five year lease with Russell Brothers Ranch, Inc. to farm and develop the lands added to the Reservation by the resurvey. N.R. 154. In reliance upon the lease, Russell Brothers cleared and leveled the lands and installed an irrigation system and drainage facilities. The improvements are valued at more than $2,800,000. N.R. 154.[5]

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[5] The boundary dispute at the Colorado River Indian Reservation involves interpretation of an Executive Order issued on May 15, 1876, which modified the Reservation boundaries as originally established by the Act of March 3, 1865 (13 Stat. 541, 559), by describing one of the boundaries as "the west bank of the Colorado River." The dispute concerns whether the boundary along the "west bank of the Colorado River" is a fixed line as established in 1876 or a moving line subject to the rules of accretion and avulsion when the River changes its course. On January 17, 1969, the Secretary, relying upon an opinion from the Solicitor, issued an order directing that approximately the northerly two-thirds of the disputed boundary was to follow a fixed line and not the changing River. Since that time, the United States has obtained final judgments quieting title in the Tribes for various parcels added to the Reservation. *Arizona v. California II*, 460 U.S. at 636n.26.

The Fort Yuma Reservation boundary dispute centers on interpretation of a cession agreement entered into between the Quechan Tribe and the United States and ratified by statute in 1894, 28 Stat. 332. The 1893 agreement provided for the allotment of irrigable lands, the sale of surplus irrigable lands under certain prescribed conditions, the holding of sales proceeds in trust for the Tribe and the allotment of nonirrigable acres to settlement under the general laws of the United States. The Department of the Interior had previously rejected the Tribe's claims to reservation boundaries which included the

(Continued on following page)

The present action was filed on July 21, 1981, by the Metropolitan Water District of Southern California and the Coachella Valley Water District (hereinafter "Metropolitan") seeking review and invalidation of the orders under the Administrative Procedure Act, 5 U.S.C. § 706. The complaint seeks a declaration that the orders are "void" and an injunction setting them aside. Metropolitan's complaint, as amended, also seeks a judicial determination of the location of the boundaries "for the purpose of proper allocation of Colorado River water pursuant to the Boulder Canyon Project Act" (43 U.S.C. § 617-619) and to protect its rights which "may be reduced in the future by valid Indian reservation diversions." E.R. 17.[6]

Metropolitan's concern at the time was that the recognition of additional reservation lands with present perfected water rights would reduce the amount of water

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land ceded by the 1893 agreement. On December 20, 1978, the Secretary issued an order declaring the 1896 cession agreement and the 1894 ratifying statute of no effect, due to the failure of the United S. tes to fulfill the conditions of the 1893 agreement.

[6] The original complaint named only the Secretary of the Interior as party defendant. N.R. 1. Subsequently, the court granted leave for the States of Arizona and California to be added as defendants. N.R. 96, 97 and 108. Thereafter the three Tribes were granted permission to intervene in the action. N.R. 43, 75 and 98.

available from the Colorado River to meet its requirements. This is because the Tribes' rights to use Colorado River water are senior to Metropolitan's contract rights.

The Tribes' water rights, as established in *Arizona v. California*, are " present perfected rights". *Arizona v. California*, Decree, 376 U.S. 340 (1964). Pursuant to stipulation with the other parties, including Metropolitan, the Tribes' rights are to be satisfied first in times of shortage, except for a small number of miscellaneous water rights. Rights totaling 120,060 acre-feet of water were awarded for the three Reservations to be charged to the California allocation under the 1964 Decree. *Arizona v. California*, Supplemental Decree, 439 U.S. 419 (1979).

Metropolitan's water rights, on the other hand, are the fourth and fifth priorities among California diverters, and are limited by the terms of Metropolitan's water delivery contract with the Secretary of the Interior.[7] Under the fourth priority, Metropolitan is entitled to receive 550,000 acre-feet per year. The fifth priority entitles it to divert 662,000 acre-feet on an annual basis.

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[7] Metropolitan is a public corporation established under California law that engages in the storage and delivery of water within the state for municipal and domestic uses. E.R. 2-3. A portion of Metropolitan's water supply is obtained from the Colorado River, pursuant to a water delivery contract executed with the Secretary of the Interior in 1930, and amended in 1931. The water contract was executed under the Boulder Canyon Project Act, 43 U.S.C. § 617, which charges the Secretary with responsibility for allocating water from the River pursuant to contracts. *See Arizona v. California I*, 373 U.S. at 580.

Metropolitan's concern, however, is that California is limited to 4.4 million acre-feet of Colorado River water per year, plus one-half of any surplus; and the three priorities ahead of Metropolitan are entitled to divert 3.85 million acre-feet annually. Thus, whenever California is limited to 4.4 million acre-feet, Metropolitan is limited to a diversion of 550,000 acre-feet, less any tribal diversions.

When Metropolitan filed its complaint in this case, Special Master Tuttle had recommended that the three Secretarial orders be treated as "final determinations" of the reservation boundaries within the meaning of this Court's decree in *Arizona v. California*. Thus, in the Special Master's view, the Tribes should have been entitled, on a conditional basis, to additional water rights for the lands in question if any of those lands were "practicably irrigable".[8] The Special Master made clear, however, that his recommended award would be subject to any future litigation brought by "some interested party." Tuttle Report p. 64.

The Court refused to award water rights to the Tribes based upon Special Master Tuttle's recommendation. The Court stated:

> In our 1963 opinion, when we set aside Master Rifkind's boundary determinations as unnecessary and referred to possible future final settlement, we in

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[8] The Special Master determined that the practicably irrigable acreage included 2,000 acres within the Fort Mojave Hay and Wood area, approximately 3,500 acres within the Colorado River Reservation area; and approximately 5,800 acres within the disputed Fort Yuma (Quechan) area.

> no way intended that *ex parte* secretarial determinations of the boundary issues would constitute "final determinations" that could adversely affect the States, their agencies, or private water users holding priority rights.

460 U.S. at 636. The Court, however, also disagreed with Metropolitan's assertion that the boundary issues should be resolved within the *Arizona v. California* proceedings. Referring to its 1963 opinion, the Court stated:

> It is clear enough to us, and it should have been clear enough to others, that our 1963 opinion and 1964 decree anticipated that, if at all possible, the boundary disputes would be settled in other forums.

460 U.S. at 638.

This action was pending at the time of the 1983 opinion, and was referred to as a possible "other forum." In an often quoted passage the Court referred specifically to this action:

> At this juncture, we are unconvinced that the United States District Court for the Southern District of California, in which the challenge to the Secretary's actions has been filed, is not an available and suitable forum to settle these disputes.

460 U.S. at 638. It was plainly recognized, however, that certain jurisdictional challenges had been asserted, which might foreclose adjudication of the boundaries in this case:

> We note that the United States has moved to dismiss the action filed by the agencies based on lack of standing, the absence of indispensable parties, sovereign immunity, and the applicable statute of limitations. There will be time enough, if any of these grounds for dismissal are sustained and not overturned on appellate review, to determine whether the boundary issues foreclosed by such action are nevertheless open for litigation in this Court. If the litigation goes forward and is concluded, there will then also be time enough to determine the impact of the judgment on our outstanding decree with respect to Indian reservation water rights.

460 U.S. at 638. The Court urged that the district court litigation be "expeditiously adjudicated." 460 U.S. at 639.

Nearly five years have passed since the Court's decision and the litigation has proceeded in anything but an expeditious fashion. In 1984, the district court proceeded under the Supreme Court's directive (N.R. 43) and the parties agreed by stipulation to address the boundary issues at the Fort Mojave Indian Reservation first. N.R. 116. The State Parties, the United States, and the Fort Mojave Indian Tribe joined in motions for partial summary judgment. The Tribe's motion requested that Secretary Morton's June 3, 1974, order be affirmed under the "arbitrary, capricious, an abuse of discretion" standard of the APA, 5 U.S.C. § 706(2)(A), based upon the administrative record.[9] Metropolitan, joined by the States of California and Arizona, argued that the Secretary's order should be struck down under the APA based upon a *de novo* review of a number of documents outside of the administrative record. N.R. 131 and 133. Metropolitan, the State of California and the State of Arizona differed, however,

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[9] This position was not arrived at easily since it is well established that public and Indian land resurvey decisions are generally unreviewable. *See Report*, Special Master Simon H. Rifkind, *Arizona v. California*, No. 8, pp. 284-85 (December 5, 1960); Tuttle Report, pp. 68-73. Nevertheless, because of the need to have the boundaries decided, the Tribes asserted that position.

in their positions respecting the proper new location of the Reserve.[10]

In December of 1984, the district court heard three days of oral argument on the respective motions. At this hearing, Judge Brewster raised previously unasserted concerns as to whether Metropolitan was entitled to protection as a "bona fide claimant" under the resurvey statute, 43 U.S.C. § 772, and Metropolitan's right to a hearing prior to the Secretarial order. The court ordered supplemental briefing on these issues. N.R. 156.[11]

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[10] Metropolitan advocated alternative locations of the Hay and Wood Reserve. One location (the one that is stated in its complaint) asserts that the western boundary is "the left bank of the Colorado River in its last natural course." E.R. 21-22. The other location would shift, not only the western boundary of the Reserve, but the entire Reserve several miles to the south and east so that the reserve would be located entirely within the State of Arizona. Under this theory the Reserve would contain the full 9,114.81 acres. N.R. 131.

The State of California advocated the "last natural channel" theory. N.R. 126-127. The State of Arizona's only position has been to advocate against Metropolitan's theory that would shift the reserve entirely into Arizona. N.R. 148.

[11] In its supplemental briefs Metropolitan asserted that it was entitled to protection as a "claimant" under 43 U.S.C. § 772 and that its property interests entitled it to a hearing before the Secretary had issued his order. N.R. 159. It candidly stated, however, that the Secretary has "broad authority" to resurvey public lands and that it did not object to the addition of public lands to the Reservation, only the attempt to make the addition retroactive. Metropolitan further took note of the unusual nature of its action.

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Nine months after supplemental briefs were filed, the district court issued its decision. Finding that the resurvey statute's provision protects "the entire spectrum of rights of claimants", the court held that the Secretary "lacks authority to relocate the instant boundaries." (Pet. App. at 19a-20a). The court ordered a *de novo* determination of the Fort Mojave Hay and Wood boundary upon this ground. (Pet. App. at 20a). As an alternative holding, the court found that even if the Secretary possessed authority, that the Secretary's order was deficient under due process standards. Pursuant to section 706(2)(D) of the APA, prohibiting agency action "without observance of procedure required by law" the court voided the order.

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> [I]t takes a judicial determination to make the boundary change in question binding on Metropolitan. Although the United States has the burden of initiating such proceedings, *we are willing to use this case as the judicial vehicle* to determine the two phases: (a) where is the boundary, and (b) whether it is binding on Metropolitan's water rights.

N.R. 159, p.3. Metropolitan further stated "this action is most appropriately viewed *as an action by the Secretary* seeking validation of his order and subsequent resurvey." N.R. 159, p.3.

The Tribes' supplemental briefs also commented on the unusual nature of this action. It was pointed out that Interior Department's public land surveys and resurveys are committed to the discretion of the Secretary and, as such, they are generally unreviewable. If they are reviewable, the standard would have to be the "abuse of discretion" standard in 5 U.S.C. § 706(2)(A). N.R. 162.

Under this ground, the court held that it was also authorized to make a *de novo* determination of the boundaries.[12]

The Tribes and the United States thereafter appealed pursuant to 28 U.S.C. § 1292(b). On appeal, the Tribes challenged the district court's rulings with respect to the scope of review under the APA, and the protection afforded under the bona fide claimant provision of the resurvey statute. In addition, the Tribes raised, for the first time, the issue of the district court's jurisdiction in light of the Quiet Title Act, 28 U.S.C. § 2409a and recent decisions construing that Act.[13]

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[12] The district court made clear, however, that it was not ruling on the merits of the parties' positions.

> The court finds that there is a lively dispute as to the boundaries and acreage intended by the United States when it established the Reserve. As a guide to the parties, the court notes that it is not as convinced as the parties appear to be that the boundaries actually surveyed by Lieutenant Wheeler are determinative of the intent of the grantor. In later proceedings, the parties should be prepared to address whose intent constitutes the intent of the grantor. For instance, the intent of those giving instructions to Wheeler may be more probative of the intent of the grantor than Wheeler's intent. In any event, the conflicting evidence regarding the intent of the grantor precludes summary judgment at this point. The court believes that a trial will be necessary to resolve this factual dispute.

(Pet. App. 25a-26a).

[13] See Fadem v. United States, 791 F.2d 1381 (9th Cir. 1986); Florida Dep't of Business Regulation v. United States Dep't of the Interior, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); United States v. Mottaz, 476 U.S. 834 (1986).

The Ninth Circuit, in a *per curiam* opinion, addressed only the jurisdictional issue. It held that Metropolitan's action was barred under the Quiet Title Act, 28 U.S.C. § 2409a, since the successful assertion of its claim would "quiet title in others than the Tribe." (Pet. App. at 9a). Relying upon its recent decision in *Wildman v. United States*, 827 F.2d 1306 (9th Cir. 1987), the circuit court rejected the argument that the United States must establish its title to the lands before invoking the Quiet Title Act. The court further rejected Metropolitan's arguments that the United States had waived its immunity through participation in the *Arizona v. California* proceedings. Noting that the boundary issues were not litigated in the Supreme Court, the Ninth Circuit stated: "An application to the Supreme Court under a continuing decree for a reallocation of water rights cannot be viewed, under any stretch of the imagination, as consent by the Secretary to suit by third parties to challenge the Secretary's authority and procedures in establishing Indian reservation boundaries." (Pet. App. at 8a) (Footnote omitted). Finally the court rejected Metropolitan's contention that the McCarran Amendment, 43 U.S.C. § 666, could be viewed as a waiver of the United States' sovereign immunity since this litigation, at most, addressed only a preliminary issue to the determination of the relative rights of certain of the competing claimants to water from the Colorado River. (Pet. App. at 11a).[14]

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[14] The court also questioned whether Metropolitan's suit presents a case or controversy since Metropolitan's water rights are not threatened so long as the boundary orders are not deemed to be final determinations. (Pet. App. at 6a).

SUMMARY OF THE ARGUMENT

1. The United States' waiver of immunity through its intervention and participation in *Arizona v. California* does not extend to the present, entirely separate cause of action challenging title to the Reservation boundaries. The State Parties concede that no case authority directly supports this position. The only authorities cited all involve a waiver by the United States when a counterclaim is asserted in the same action. The present case does not involve a counterclaim. The United States' intervention in the *Arizona v. California* did nothing more than subject the federal government to the jurisdiction of this Court in that separate proceeding. There must be a separate waiver of immunity to support the present action. This requirement is supported by public policy since adoption of the State Parties' position would lead to piecemeal adjudication of federal water rights. Finally, there is not even a need to adopt such a rule in the present case. The State Parties' interests are protected in the Court's decree in *Arizona v. California*, and the Tribes cannot increase their water rights without an adjudication of the boundaries that includes the State Parties.

2. The United States has not waived its immunity from suit for the present boundary challenges in the Administrative Procedure Act. The waiver under 5 U.S.C. § 702 is limited by a provision that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The Quiet Title Act is an "other statute" that expressly forbids the relief being sought. In this case, if the relief being sought is granted the Tribes would lose more than 30,000 acres of

their reservation lands. The severed lands would still be held in fee by the United States as public lands, but that is of little consolidation to the Tribes since they would lose their entire interest in the lands.

The waiver of immunity provision in 5 U.S.C. § 702 is not the general "catchall" provision that the State Parties assume. The provision makes clear on its face that it was not intended to supplant other statutes such as the QTA, limiting judicial challenges to federal government actions. This view is supported by the legislative history of Section 702 and this Court's decision in *Block v. North Dakota*, 461 U.S. 273 (1983).

It does not matter that the State Parties do not seek to quiet title in their own name. The complaint plainly seeks to determine if the lands are held in trust for the Tribes and will quiet title "in others" as the court of appeals found. There is nothing in the QTA, or its legislative history, to suggest that it applies only when a party seeks to quiet title in the traditional sense. To the contrary, the Eleventh Circuit held in *State of Florida v. U.S. Department of Interior*, 768 F.2d 1248 (11th Cir. 1985) cert. denied 475 U.S. 1011 (1986) that such a reading would effectively nullify the "Indian lands exception" in the QTA.

Nor does it matter that, even if successful, this litigation would not totally divest the United States' title. This Court in *United States v. Mottaz*, 476 U.S. 834 (1986), applied the QTA under similar circumstances where the relief sought would have returned the land to trust status and not divest the United States of the underlying fee.

The Indian lands exception applies in this case. As interpreted by this Court, the exception retains the

United States' immunity in actions "by third parties *challenging the United States' title to lands held in trust for Indians.*" *United States v. Mottaz, supra,* 476 U.S. at 842 (emphasis added). As stated by the Court, "when the United States *claims an interest* in the real property based upon the property's status as trust or restricted Indian lands," the QTA does not waive the Government's immunity. *Id.* at 843 (emphasis added). No one disputes that the lands in question here are claimed by the United States based upon their status as trust or restricted Indian lands.

Finally, there is no requirement that the United States and Tribes must demonstrate a "substantial possibility" that the disputed lands are in fact Indian lands before invoking the sovereign immunity of the United States to foreclosure suit. The language of the QTA intimates no such test. While allowing the United States to be named as a party defendant, nothing in the exception regarding Indian lands or its history suggests that the United States' immunity was waived in order to test the validity of its claim before invoking the Indian lands exception to the waiver of immunity in the QTA.

ARGUMENT

I. THE UNITED STATES HAS NOT WAIVED ITS IMMUNITY FROM SUIT FOR THIS BOUNDARY ACTION BY ITS INTERVENTION AND PARTICIPATION IN THE SEPARATE *ARIZONA V. CALIFORNIA* PROCEEDINGS.

The State Parties contend that the assertion of reserved water rights by the United States in the *Arizona v. California* proceeding brought under the original jurisdiction of this Court (U.S. Const. Art. III and 28 U.S.C. § 1251) waives the government's sovereign immunity in this entirely separate cause of action brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the Federal Question Statute, 28 U.S.C. § 1331.

There is absolutely no support for this novel contention.[15] As the State Parties concede, no court has ever sanctioned a shifting of a waiver of the government's immunity from one action to another. The several cases that are cited all involved waivers of the United States' immunity for counterclaims in the same action. *United States v. Norwegian Barque "Thekla"*, 266 U.S. 328 (1924); *United States v. Taunah*, 730 F.2d 1360 (10th Cir. 1984); *Jones v. Watts*, 142 F.2d 575 (5th Cir. 1944); and *United States v. Martin*, 267 F.2d 764 (10th Cir. 1959). The cases do not even remotely support the States Parties' contention that the United States' waiver in *Arizona v.*

[15] Indeed, the State Parties candidly admit that the issue is of "first impression" (Pet. Br. at 18), that they "have found no case" to support this proposition (Pet. Br. at 19), that "Congress has not expressly so provided" (Pet. Br. at 23); and that it "would be without direct precedent" (Pet. Br. at 23).

California can be extended to this entirely separate action. The present action is simply not a counterclaim.[16]

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[16] In *Thekla*, the United States was suing the owners of the Thekla for damages arising out of a collision with an army transport ship the Luckenbach. The owners of the Thekla thereafter filed a cross-libel or cross-claim against the United States alleging that the Luckenbach was at fault for the collision. The United States interposed a defense of sovereign immunity. This Court rejected the Government's defense finding that when the United States "joined in the suit" it "carried with it the acceptance of what liability the courts may decide to be reasonably incidental to that act." 266 U.S. at 341. In other words, when the United States files an action it is subject to counterclaims involving that subject matter.

In *United States v. Taunah*, the United States brought a quiet title on behalf of certain Indian allottees concerning a tract of land. Defendants were family members who also claimed title to the lands. They asserted a counterclaim for equitable relief to which the United States asserted its sovereign immunity. In rejecting this defense the court stated:

> This is no more nor less than a family dispute. The Government chose one side and sues on behalf of that side. The real plaintiff is not the United States, but one group of heirs. We see no reason why the *small exception* to the immunity doctrine should not be applied *to permit the counterclaim* to be asserted as a lien and so not to venture outside the subject of the original cause of action.

730 F.2d at 1362 (emphasis added). The *Taunah* case, therefore, only supports a waiver for a counterclaim within the very same action.

Jones v. Watts is similarly not supportive of the State Parties' position. In that case, the United States had instituted an action to enforce a money judgment after an alleged default. The defendant filed a separate action against the United States

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In effect, the State Parties are seeking to imply a waiver of the United States' immunity where no express congressional waiver can be found. This, of course, is prohibited. As this Court has held on numerous occasions, a waiver of sovereign immunity "cannot be implied but must be unequivocably expressed." *United States v. King*, 395 U.S. 1, 4 (1969); *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978), *United States v. Testan*, 424 U.S. 392, 399 (1976). If the State Parties are to find a waiver, they must look to express legislation. As discussed *infra* at pp. 28-45, there is no such express waiver to be found.

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seeking to have the judgment set aside on the basis that there was no personal service to which the United States asserted its sovereign immunity. The court in *Jones* agreed and affirmed dismissal of that separate action. It went on to say that the defendant might have a possible remedy against the United States, but that could be in the original enforcement action through a motion to quash the execution of the judgment.

The State Parties' reliance upon *United States v. Martin*, is similarly misplaced. In *Martin* the United States had filed a declaratory class action for an adjudication of water rights to the Colorado River arising out of the Big Thompson project. The defendants were landowners and water users who claimed an interest in the project waters. Those defendants filed an answer and counterclaim alleging that the Secretary of the Interior's actions through operation of the project were harming their water uses. The Secretary moved to dismiss the counterclaim on grounds of sovereign immunity. The court rejected the defense, finding that "when the United States institutes a suit" it consents to the "adjudication of all matters and issues which are reasonably incident thereto" that are raised by the counterclaim. 276 F.2d at 769.

There is also no support for the State Parties' proposition in this Court's opinion in *Arizona v. California II.* The Court pointed to this action as a possible "available and suitable forum" to settle the boundary disputes. 460 U.S. at 638. But, the Court specifically acknowledged the possibility that jurisdictional barriers may prevent the action from going forward. *See* 460 U.S. at 638. Indeed, the Court referred to the sovereign immunity defense presently being asserted. The Court clearly did not find that the United States had waived its sovereign immunity. Otherwise the Court would not have stated that "if any of these grounds for dismissal [standing, indispensable parties, sovereign immunity, statute of limitations] are sustained," " there will be time enough" to determine whether they are "nevertheless open for litigation in this Court". 460 U.S. at 638. The Court appears to have anticipated the possibility that the United States might successfully assert its sovereign immunity in the pending district court action.[17]

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[17] The United States did not, and could not, waive its immunity by statement to this Court or in the district court. The State Parties have taken Mr. Claiborne's "disownment" comment entirely out of context (Pet. Br. at 11). As the full text of the exchange reveals (App. 1a), Mr. Claiborne was merely saying that he was not responsible for the filing of the motion. He even stated that if the motion were successful that "we would rest on the correctness of that ruling." (App. 1a). This is hardly an abandonment of the defense.

Similarly, the United States' Amended Motion to Dismiss in the district court did not waive the government's immunity. The federal government is not subject to waiver or estoppel

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The United States' intervention and participation in *Arizona v. California* did nothing more than subject the federal government to the jurisdiction of this Court in that case. In *Arizona v. California* the United States presumably waived its immunity with respect to the resolution of the boundary issues. But that waiver only applied within the *Arizona v. California* proceeding and cannot be transferred to an entirely separate action. This Court has never interpreted its original jurisdiction to have such a broad application. To the contrary, the Court has consistently construed its jurisdiction "sparingly" (*United States v. Nevada,* 412 U.S. 534, 538 (1973)) and whenever it has referred to the possibility of issues being decided in other forums, it has made it clear that the other forum must be one "where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Maryland v. Louisiana,* 451 U.S. 725, 740 (1981), quoting *Illinois v. City of Milwaukee,* 406 U.S. 91, 93 (1972). In short, there must be a separate jurisdictional basis for the issues to be decided in a separate forum.[18]

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when it asserts the defense of lack of jurisdiction. More significantly, the United States' Amended Motion to Dismiss did not even purport to withdraw objections to challenges to title to the lands. The amendment only purported to withdraw the government's objections where "the legal title to the lands is not at issue." N.R. 37. Clearly in this case the legal title to the property is at issue.

[18] There is no analogy to this case and the principle of derivative jurisdiction for removal or to the principles of

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The requirement for a separate jurisdictional basis is supported by public policy. "It is a fundamental precept that federal courts are courts of limited jurisdiction." *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). The jurisdiction of the federal courts is defined and constrained by Article III of the Constitution and federal statutes. There is no constitutional provision or federal statute for the assumption of jurisdiction over an action merely because the United States has decided to waive its immunity in an entirely separate action. Sanctioning such a rule could open the door for virtually unlimited waivers of the United States sovereign immunity in the federal courts whenever the Government has invoked the original jurisdiction of this Court.[19]

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ancillary jurisdiction. The derivative jurisdiction for removal is statutorily based. 28 U.S.C. § 1441. Here, there is no federal statute permitting the transfer of the United States' sovereign immunity.

The doctrine of ancillary jurisdiction is based upon practical considerations and judicial economy. However, this Court has refused to extend the doctrine to cases where there is no independent jurisdictional basis. Aldinger v. Howard Treasurer of Spokane County, 427 U.S. 1 (1976); Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). ("But neither the convenience of litigants nor considerations of judicial economy can suffice to justify extension of the doctrine of ancillary jurisdiction to a plaintiff's cause of action" where there is no basis for federal jurisdiction. *Id.* at 377).

[19] The State Parties themselves refer to the creation of the so-called "Thekla rule" as waiving the United States' immunity

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The piecemeal adjudication of the federal rights – in this case federally reserved water rights – contravenes the policies of "wise judicial administration" (*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); and also the policies set forth in the McCarran Amendment, 43 U.S.C. § 666, governing the adjudication of the United States' federally reserved water rights. As this Court stated in *Colorado River*, "[t]he clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system." 424 U.S. at 819. The Court went on to say:

> This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.

424 U.S. at 819-820. *See also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). This policy of adjudicating the reserved rights of the federal government in "unified proceedings" would be frustrated by adoption of the State Parties' proposed rule. It would allow elements of the United States' water rights to be adjudicated in other

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"without limitation as to forum." (Pet. Br. at 20). Under this rule there would be no limit to the extent to which private parties could sue the United States.

forums, "permitting inconsistent dispositions of property." 424 U.S. at 819.[20]

Furthermore, adoption of the so-called "Thekla rule" is not necessary in the present case. A finding that the United States retains its sovereign immunity in the district court does not leave the State Parties without a forum to protect their interests. The existing decree in *Arizona v. California* enjoins the Tribes from diverting and using any water within the disputed areas in violation of the decree. Without some sort of adjudication of the boundaries the Tribes cannot obtain water rights for the areas in question. This Court made it clear in *Arizona v. California II*, that when that time comes, the State Parties will be entitled to participate. In view of that fact, there is

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[20] The McCarran Amendment does not provide a waiver of the United States' immunity in the present action. The McCarran Amendment provides that the . . . United States may be joined as a defendant in "any suit . . . for the adjudication of rights to the use of water of a river system or other source." 43 U.S.C. § 666. This Court has squarely held that that does not authorize joinder of the United States in a private suit where all water claimants had not been joined. Dugan v. Rank, 372 U.S. 609 (1963). *See also* Nevada v. United States, 279 F.2d 699 (9th Cir. 1960); Miller v Jennings, 243 F.2d 157 (5th Cir.) *cert. denied* 355 U.S. 827 (1957). The present action does not seek an adjudication of water rights. It challenges title to certain lands. Moreover, even if it could be construed to seek an adjudication, the suit does not involve all claimants to the river system, as required by the McCarran Amendment.

no need for this Court to create a special "Thekla rule" to apply to this case.[21]

Finally, the State Parties' suggestion that the Court "short circuit" the proceedings by appointing a new special master highlights the serious flaws in their attempt to "use this case as the judicial vehicle" to decide the boundary issues. Pet. Br. at 24. (See p. 13 fn. 11, *supra*). As the State Parties admit, scope of review and jurisdictional issues have plagued the parties throughout these proceedings. (Pet Br. at 24). A major problem is that, try as they might, the State Parties cannot separate the "land title questions" associated with their challenge from the "water rights nature" of their challenge. They may contend that they have no interest in the land and that they are only interested in the appurtenant water rights (Pet. Br. at 22), but the fact remains, as their complaint in this case demonstrates, that there is no way to separate the two.

The result is the procedural morass in the district court. If the action is not dismissed, substantial questions will remain concerning "case or controversy", statute of limitations (both under both the Quiet Title Act and the Administrative Procedure Act), the Secretary's authority under 43 U.S.C. § 772, due process protection, and the appropriate scope of review. These difficult issues all

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[21] The State Parties' claim that they need to have the boundaries resolved for planning purposes is nonsense. As the dissenting opinion in *Arizona v. California II* found, under current projections the Metropolitan Water District will not be ready to use its existing entitlements before the year 2010. 460 U.S. 653n.7.

arise becaue the State Parties are "forced" into bringing an action to challenge administration action that is under normal circumstances, unreviewable. *See Lane v. Darlington*, 249 U.S. 331, 333 (1919). In essence, they are trying to fit a square peg in a round hole. It just does not work.

Unfortunately that will not resolve the question of the appropriate forum for resolution of the boundary issues. The State Parties advocate (as they did before the Court in *Arizona v. California II*) the appointment of a special master. The Tribes agree that such a course of action might be the most expeditious way to resolve the boundary issues, in view of the jurisdictional and procedural barriers that exist in the district court.[22]

II. THE APA DOES NOT WAIVE THE SOVEREIGN IMMUNITY OF THE UNITED STATES WHERE, AS HERE, THE STATUS OF TRUST LAND IS CHALLENGED

A. The Relief Sought in this Case Will Divest The Tribes of Their Lands.

Metropolitan seeks to avoid the United States' immunity to suit by invoking the waiver of immunity provision of Administrative Procedure Act, 5 U.S.C. § 702. E.R. 2. Its complaint asks the district court to declare "void" and to issue an injunction setting aside the three orders of the Secretary of the Interior which determined the location of

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[22] It would not be appropriate, however, to appoint district court Judge Brewster as the Special Master.

portions of the boundaries of the three Indian Reservations. The requested relief would divest the Tribes of their beneficial interest in the lands in question and require the United States to hold the disputed areas as public lands rather than as trust lands for the benefit of the Tribe.

The APA does not waive the immunity of the United States in this case because "[n]othing [in the APA] . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. The relief sought by Metropolitan is foreclosed by the terms of the Quiet Title Act, which waives the immunity of the United States in suits "to adjudicate a disputed title to real property . . . " but "does not apply to trust or restricted Indian lands." 28 U.S.C. § 2409a(a). As noted by the Ninth Circuit, allowing Metropolitan's suit "would permit third parties to interfere with the Government's discharge of its responsibilities to Indian tribes in respect to lands it holds in trust for them," in violation of the protection afforded tribal interests in the QTA. (Pet. App. at 10a.) As a result, the sovereign immunity of the United States bars Metropolitan's lawsuit.

It is important to understand the nature of the relief being sought by the State Parties in this action. Metropolitan's complaint seeks to have the Secretary's boundary orders set aside as "illegal and void"; and to make a "judicial determination and declaration of the boundaries" of the three Reservations. E.R. 13-23. For example, regarding the Fort Mojave Hay and Wood Reserve, Metropolitan seeks to vacate Secretary Morton's order on the

grounds that it is "arbitrary, capricious and unreasonable" E.R. 16. Following the declaration that the order is void, Metropolitan would have the court undertake to determine the "proper" location of the western boundary of the Reserve. According to Metropolitan, "the western boundary of the Camp Mojave Hay and Wood Reserve is the left bank of the Colorado River in its last natural course, excluding the lands of the Colorado River." E.R. 21.[23] If such relief is granted, the Fort Mojave Reservation would be reduced by at least 3,500 acres.[24]

In short, if Metropolitan succeeds, the three Tribes will lose over 30,000 acres of land now included in their Reservations.[25] The severed lands would still be held in fee by the United States as public lands under the control

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[23] As noted *supra* at p. 12 fn. 10, Metropolitan has advocated alternate theories with respect to the "proper" location of the western boundary of the Reserve. In addition to the "last natural course" theory, Metropolitan argues that the full 9114.81 acre Reserve can be located entirely in Arizona. If that theory were accepted, the Fort Mojave Tribe would no longer have any lands in the State of California.

[24] If the order is merely vacated, the Tribe would lose approximately 3,500 acres, since the 1928 resurvey would come into effect. If the last natural course theory is accepted, the Tribe would lose virtually all of the lands within the Reserve. If the Reserve were relocated to the State of Arizona, that would not add the full 9,114.81 acres to the Fort Mojave Reservation, since the relocated reserve would be located on lands already owned by the Tribe.

[25] At Fort Yuma (Quechan), some 25,000 acres of Reservation lands would be severed. At the Colorado River Indian Reservation, some 4,400 acres would be lost. 460 U.S. at 631-33.

of the United States Bureau of Land Management. But that is of little consolation to the Tribes. As a part of their Reservations, the lands are beneficially owned as Indian lands secured by statutes and Executive Orders. *Arizona v. California I*, 373 U.S. at 595-98, and are subject to the special federal laws and regulations that protect and preserve Indian trust lands. *See* F. Cohen, *Handbook of Federal Indian Law* 508-28 (1982 ed.).[26] In contrast, as part of the public domain, the lands would be governed by a completely separate body of federal laws and statutes. *See, e.g.*, the Federal Land Policy Management Act of 1976, 43 U.S.C. § 1701-1728.[27]

Despite the obvious impact on the tribal and federal interests, the State Parties contend that this suit does not fall within the scope of the QTA because they do not claim an interest in any of the lands at issue. Thus, in their view, the APA is an available avenue for relief. The State Parties further argue that even if this suit is governed by the QTA, the Tribes and the United States must

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[26] For example, the lands would be protected against alienation by the Non-Intercourse Act, 25 U.S.C. § 177.

[27] The differences between public lands and trust lands are substantial. When Congress commissioned the study of federal lands by the Public Law Review Commission, Indian lands were excluded. Act of September 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (formerly codified as amended at 43 U.S.C. §§ 1391-1400 (1971)). Indian lands were studied separately by the American Indian Policy Review Commission. Act of January 2, 1975, Pub. L. No. 93-580, 88 Stat. 1910 (not codified but set out in full at 25 U.S.C. § 174 n.). This Court has also recognized the great differences between the two categories of land. *Cramer v. United States*, 261 U.S. 219, 226-230 (1923).

demonstrate a "substantial possibility" that the disputed lands are trust lands before the district court is divested of jurisdiction. Neither argument is persuasive. Nothing in the language or the history of the QTA suggests the limited applicability urged by the State Parties. And there is no hint anywhere that Congress, in providing a special exception for protecting Indian lands from suit meant for that protection to be effective only after the United States demonstrated the merits of its decision to treat the lands in question as trust lands.

B. The APA Does Not Provide Relief Foreclosed by Other Statutes.

The State Parties' contentions ignore Congress' explicit desire under the APA not to disrupt other statutory provisions such as the QTA, which control the resolution of disputes with the United States in specific areas. As both the language and history of section 702 indicate, Congress did not intend to override the limits of other statutes allowing judicial challenges to the actions of the United States. In *Block v. North Dakota*, 461 U.S. 273 (1983), this Court rejected North Dakota's attempt to circumvent the QTA by the use of section 702, stating:

> We also reject North Dakota's claim that, even if the QTA pre-empted alternative remedies in 1972, Congress created a new supplemental remedy four year later when it amended 5 U.S.C. § 702 with Pub. L. No. 94-574, 90 Stat. 2721. That statute waived federal sovereign immunity for suits against federal officers in which the plaintiff seeks relief other than money damages, but it specifically confers no "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought."

461 U.S. at 286n.22, quoting the APA.

The legislative history of section 702 fully supports that view. The present version of section 702 was enacted in 1976 as part of Pub. L. No. 94-574. It was an effort by Congress to address various technical defenses used by the United States to preclude judicial review of agency action. In addressing the then-existing barriers to such review, Congress carefully ensured that "[the amendment] would not affect other limitations on judicial review . . . " or "grant relief if any other statute granting consent to suit expressly or impliedly forbids the relief which is sought." S. Rep. No. 996, 94th Cong., 2d Sess. 2 (1976) ("S. Rep. 996"). Thus, the Senate Judiciary Committee viewed the bill as accomplishing only a "partial elimination of sovereign immunity." *Id.* at 9.

The critical clause protecting the framework of existing statutes was added at the prompting of the Department of Justice to ensure conformity with the recommendations of the Administrative Conference. S. Rep. 996 at p. 13. The final phrasing

> makes clear that the committee's intent to preclude other remedies will be followed with respect to *all* statutes which grant consent to suit and prescribe particular remedies. The proviso as amended also emphasizes that the requisite intent can be *implied* as well as expressed.

Id. (emphasis added).[28]

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[28] In limiting section 702, Congress was aware that only four years earlier it had enacted legislation governing actions to adjudicate disputed titles to real property. S. Rep. 996 states:

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C. The QTA is an "Other Statute" that Expressly Forbids the Relief Sought in this Case.

The QTA applies to "civil action[s] under this section to adjudicate a disputed title to real property in which the United States claims an interest . . . " 28 U.S.C. § 2409a(a). "Congress intended the QTA to provide the exclusive means by which adverse claimants could challenge the United States' title to real property." *Block v. North Dakota, supra,* 461 U.S. at 286 (footnote omitted). In *United States v. Mottaz, supra,* the Court emphasized that it is the nature of the relief being sought, not its characterization by the plaintiff, that determines the applicability of the QTA. 476 U.S. at 842.

The State Parties argue vigorously that they do fit within the scope of the QTA since they are not seeking to quiet title in themselves in the traditional sense.[29] (Pet.

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> Perhaps the only situation under recent case law, other than suits for damages, where it was fairly predictable–and intended by Congress–that a court would uphold a claim of sovereign immunity, involved disputed title to real property. The results in these cases were so obviously unjust that in 1972 . . . Congress enacted legislation to permit actions to quiet title to be brought against the United States.

S. Rep. 996 at p. 8 (footnote omitted).

[29] The State Parties do not address the longstanding refusal by the courts to interfere with the Department of the Interior's authority to survey and resurvey the public lands. The Secretary's authority to determine or correct boundaries of the public lands is beyond question. *See* 43 U.S.C. §§ 1, 2, 751, 752, 772 (1982). Since the matter rests with the executive

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branch, such surveys have always been considered conclusive in collateral proceedings. Borax Consol. Ltd. v. Los Angeles, 296 U.S. 10, 16-17 (1935), Stoneroad v. Stoneroad, 158 U.S. 240, 250-52 (1895), Knight v. United States Land Ass'n, 142 U.S. 161, 176-78 (1891), Cragin v. Powell, 128 U.S. 691, 698-99 (1888).

In Lane v. Darlington, 249 U.S. 331 (1919), this Court succinctly stated the longstanding rule that only parties whose title is affected may challenge government surveys.

> So long as the United States has not conveyed its land it is entitled to survey and resurvey what it owns and to establish and reestablish boundaries, as well one boundary as another, the only limit being that what it thus does for its own information cannot affect the rights of owners on the other side of the line already existing in theory of law. If, as the result of the survey adopted, the United States should give patents for land thought by the plaintiffs to belong to them, "the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the Land Department the functions which the law confides to them and exercise them by the Court." Litchfield v. The Register, 9 Wall. 575, 578. Minnesota v. Lane, 247 U.S. 243, 250.

Id. at 333. An example of a direct challenge is a pending survey protest by bona fide claimants to Fort Mojave Reservation "checkerboard" lands that were awarded water rights in Arizona v. California II based upon a 1982 resurvey. *See* First American Title Ins. Co. v. Bureau of Land Management, 100 IBLA 270 (1987).

Assuming that QTA does not govern in such circumstances and that the APA therefore waives the United States' immunity to suit, Metropolitan must still show that the interests it seeks to protect are "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in

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Br. at 25-30.) But plainly Metropolitan seeks to divest the Tribes of their interests in the disputed lands. The complaint does not seek a boundary determination in order to ascertain the scope of tribal jurisdiction, to decide the applicability of various federal environmental laws, or for any purpose other than to determine whether the disputed land is held in trust for the benefit of the affected Tribes. It makes little difference if, in the end, title is not quieted in Metropolitan's name. The fact remains, as the Ninth Circuit aptly stated, that "the effect of a successful challenge would be to quiet title in others than the Tribe." Pet. App. at 9a.[30]

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question." Association of Data Processing Service Org. v. Camp, 397 U.S. 150, 152-53 (1970). Nothing in federal survey statutes suggests that they were intended to protect parties such as Metropolitan. For example, 43 U.S.C. § 772 protects the interests of "any claimant, entryman, or owner of lands affected by such resurvey or retracement." Metropolitan does not fit any of those categories, since it claims no land within the resurveyed areas. *See also* Fadem v. United States, 791 F.2d 1381, 1383 (9th Cir. 1986) (There is no private cause of action – either express or implied – under the federal survey statutes.)

[30] The State Parties' admitted concern over the Secretary's orders is the possible impact of those orders on the allocation of water to the Tribes under the Court's decree in *Arizona v. California*. Any increase in the tribal rights will be dependent on two factors. First, the Court must conclude that the boundary disputes have been finally determined, *i.e.*, subjected to judicial review. To affect the tribal water rights, the lands must be held as trust lands, not merely included within the exterior boundaries of the Reservation. *See* Arizona v. California, Decree, 376 U.S. 340, 342, 345 (1964).

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Nothing on the face of the QTA suggests that it was intended to apply only when the plaintiff claimed title to the disputed land. The State Parties cite to the requirement under subsection (c) that the plaintiff set forth the nature of *its* "right, title, or interest" in the property. Pet. Br. at 25. That provision hardly supports the State Parties' position. Indeed, if anything, it demonstrates that the Act applies to a broad range of claims other than claims to title, where a plaintiff asserts a "right" or "interest" other than actual title to the lands.[31] Similarly, by disclaiming

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The areas recognized as trust lands also must be found to be "practically irrigable." *Arizona v. California II*, 460 U.S. at 640, 641. Special Master Tuttle previously addressed the issue of the irrigability of the disputed lands but the Court found it unnecessary to address his recommendations in light of its decision not to accept the Secretary's orders as finally determining the reservation boundaries in the absence of any opportunity for the petitioners to challenge the Secretary's conclusion. *Id.* at 641.

[31] On page 26 of their Brief, the State Parties cite four cases decided before *Block v. North Dakota, supra,* and *United States v. Mottaz, supra,* in support of their contention that the QTA does not apply to actions in which the plaintiff claims no interests in the disputed property. With the exception of the City of Sault Ste. Marie v. Andrus, 458 F. Supp. 465 (D.D.C. 1978), those cases address the question of who may invoke the waiver of immunity in the QTA rather than the interaction between section 702 of the APA and the QTA. Florida Dept. of Business Regulations v. United States Dep't of the Interior, 768 F.2d 1248 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986) provides a more thoughtful analysis of that issue that reflects the holding in *Block* and is consistent with the holding below in this case:

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the application of the waiver to litigation over the security interests or water rights of the United States, the language indicates that the QTA was intended to govern *all* other disputes over the real property interests of the federal government.

This Court's decision in *United States v. Mottaz, supra,* provides a complete response to the State Parties' arguments that the Act applies only when the United States is in danger of losing its title to the land. There, the respondent, a Chippewa Indian, claimed an interest in certain lands which were formerly held as allotments. "Title to each of these allotments [had been] held in trust by the United States." 476 U.S. at 836. Mottaz's interests in the allotments had been sold to the Forest Service for inclusion in the Chippewa National Forest. In her lawsuit, Mottaz sought return of the land. Thus, as here, legal title

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> By forbidding actions to quiet title when the land in question is reserved or trust Indian land, Congress sought to prohibit third parties from interfering with the responsibility of the United States to hold land in trust for Indian tribes. Here the appellants seek an order divesting the United States of its title to land held for the benefit of an Indian tribe. That appellants do not assert an adverse claim of title to the land, however, does not lessen the interference with the trust relationship a divestiture would cause. Moreover, Congress chose to preclude an adverse claimant from divesting the United States' title to Indian lands held in trust. It would be anomalous to allow others, whose interest might be less than that of an adverse claimant, to divest the sovereign of title to Indian trust lands. Hence we conclude that the APA waiver of immunity is inapplicable in this instance.

768 F.2d at 1254-55 (footnotes omitted).

was not at issue. The relief sought by Mottaz would simply have returned the land to trust status and not have divested the United States of the underlying fee. The Court nevertheless denied relief, determining that the QTA applied and that its twelve-year statute of limitations precluded suit.

D. The Indian Lands Exception Applies.

The history of the Indian lands exception demonstrates Congress' intent to protect Indian lands from challenges such as those brought by Metropolitan. In addition to the operative sentence of the Quiet Title Act, the legislation provided "several 'appropriate safeguards for the protection of the public interest'" recommended by the executive branch. *Block v. North Dakota, supra,* 461 U.S. at 283, quoting from the testimony of Department of Justice officials at the Senate Hearing. For purposes of this case, the most important aspect of the executive proposal was the provision which "excluded Indian lands from the scope of the waiver." *Id.*

The bill as passed by Congress closely resembled the executive branch proposal. The final legislation implemented the Department of Justice's desire to make sure that "trust and restricted Indian lands are specifically protected from *challenge* . . . " Letter to the Vice President from the Attorney General, dated October, 1971, included in S. Rep. 575 at p. 5 (emphasis added). The importance of the changes suggested by the Justice Department has been noted by the Solicitor of the Department of the Interior.

> The Justice proposal specifically excludes land held in trust for Indians and Indian restricted lands. The federal Government's trust responsibility for Indian lands is the result of solemn obligations entered into by the United States government. The Federal Government has over the years made specific commitments to the Indian people through written treaties through treaties and through informal agreements. The Indians, for their part, have often surrendered claims to vast tracts of land. President Nixon has pledged his administration against abridging the historic relationship between the Federal Government and the Indians without the consent of the Indians.

H. Rep. No. 1559, 92d Cong., 2d Sess. p. 13 (1972); S. Rep. No. 575, 92d Cong., 1st Sess. 4 (1971). Waiver of immunity in suits affecting Indian title was viewed as inconsistent with longstanding federal commitments to Tribes. *Block v. North Dakota, supra,* 461 U.S. at 283.

Thus, despite its intent in the QTA to permit the adjudication of disputes over federal property interests, Congress carefully crafted an explicit exception to protect individual Indians and tribes from litigation over claims to their property. Whatever the merits of allowing suits with the potential to divest the federal government of its property, Congress felt that the importance of keeping Indian lands free from judicial challenge outweighed the need to extend its newly-created rule to Indian lands.

The State Parties' arguments are in direct conflict with the protections for Indian lands desired by the executive branch and enacted by Congress. This Court's decision in *Mottaz* explains the proper application of the Indian lands exception. In response to Mottaz's argument that the QTA did not apply to her claims, the Court stated that "when the United States *claims* an interest in real

property based on that property's *status as trust or restricted Indian Lands,* the Quiet Title Act does not waive the Government's immunity." 476 U.S. at 843 (emphasis added). Here, since the lands in dispute are held as trust lands,[32] the United States' immunity has not been waived.

E. The United States Is Not Required to Demonstrate a Substantial Possibility that the Lands Are Trust or Restricted Lands.

The State Parties also contend that even if the QTA applies to this case, the United States and Tribes must demonstrate a "substantial possibility" that the disputed lands are in fact Indian lands before invoking the sovereign immunity of the United States to foreclose suit. (Pet. Br. 36-43).

Neither the language nor the history of the QTA intimates such a test. While allowing the United States to be named as a party defendant in title disputes, nothing in the exception regarding Indian lands or its history suggests that the United States' immunity was waived in order to test the validity of the federal assertion that the lands under scrutiny were held for the benefit of Indians. To the contrary, under the bill, as described by the Attorney General, Indians are specifically protected from "challenge." H. Rep. 1559, *supra,* at 10.

The State Parties' contention runs directly contrary to Congress' intent. The express protection which Congress

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[32] There is no dispute that the lands in question are currently held in trust for the Tribes and Metropolitan's complaint acknowledges this fact. E.R. 4.

extended to Indian lands would be obviated if the United States were put to the task of proving its claim of trust status before invoking its sovereign immunity to bar suits adjudicating the status of such lands. Congress, as urged by the executive branch, plainly felt that the need to provide a forum for the adjudication of title disputes with the United States did not warrant the disruption of the federal relationship with Indian tribes which would occur if suits to challenge federal claims to land on behalf of Indians were allowed.

The State Parties rely on *Spaeth v. United States Secretary of the Interior*, 757 F.2d 937 (8th Cir. 1985), to support their argument that the United States must demonstrate the validity of its claims before invoking its immunity. Their reliance on *Spaeth* overlooks the fact that the lands in dispute in that case were not held in trust by the United States or otherwise treated as Indian lands, but rather were subject only to outstanding claims by the United States that the Spaeths' title was invalid and the lands should be considered to be Indian lands.[33]

The *Spaeth* court expressly acknowledged that its "analysis of the jurisdictional issues [was] affected by the

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[33] The Department of the Interior had written the Spaeths indicating the possibility of outstanding claims to the lands which the Spaeths had possessed for thirty years and were attempting to sell. The Department had also issued a Solicitor's opinion which clouded the title to lands, such as the Spaeths, which originally had been allotted to members of the White Earth Band of Chippewas, and had arguably gone out of trust status through improper methods. As a result of the actions of the Department of the Interior, the sale price of the Spaeths' land was reduced by fifty percent.

extremely unusual facts of [the] case." 757 F.2d at 945. The court of appeals resolved the question of whether to apply the Indian lands exception to lands possessed by non-Indians by concluding that the exception would apply only if the United States demonstrated a substantial possibility that the lands in question were, indeed, trust or restricted lands.

No such unusual facts exist here. There is no dispute over the status of the lands which are the subject of Secretarial orders, and held in trust for the benefit of the affected Tribes. The *Spaeth* court's willingness to look behind the status of the disputed lands is also inconsistent with this Court's treatment of the same issue in *United States v. Mottaz, supra*, where the existing status of the lands as National Forest lands – whatever the merits of Mottaz's claim – was determined to preclude the application of the Indian lands exception. 476 U.S. at 842-43.[34]

Finally, the State Parties' claims of great "potential for mischief" in the absence of a test such as that

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[34] Moreover, there will be no impact on the State Parties in the absence of a tribal or federal motion in *Arizona v. California* to increase the allocations to the Tribes. And, certainly, this Court has made it very clear that such a motion cannot succeed in the absence of an opportunity for Metropolitan to challenge the Secretary's disputed orders. As a result, the unresolved status of the boundaries imposes no burden on Metropolitan, which, as Special Master Tuttle noted, has not even bothered to address the possibility of increased awards of water to the Tribes. *Tuttle Report* at 43.

suggested in *Spaeth* are not persuasive.[35] Certainly, those claims provide no justification for overriding the clear intent of Congress. In any event, parties affected by federal decisions to hold land in trust will almost always have a forum in which to challenge the disputed decisions, whenever those decisions injure their interests. In such circumstances, implementation of the federal decision will require the United States to initiate litigation in which sovereign immunity will not foreclose adjudication of the merits of the federal viewpoint.[36] Only when the

[35] The State Parties repeatedly remind the Court that the boundary disputes at Ft. Mojave and Colorado River were resolved against the Tribes and the United States by Special Master Rifkind. In so noting, the State Parties neglect to mention that, in reaching his conclusions, the Special Master relied heavily on the fact that the official pronouncements of the Interior Department were in conflict with its litigating position before the Special Master. The disputed orders eliminate these inconsistencies in order to permit scrutiny of the Government's position so that ultimately the Tribes may obtain water for such lands in *Arizona v. California*.

[36] As the 1983 decision in *Arizona v. California* clearly states, the United States cannot invoke its sovereign immunity to foreclose a challenge to the Secretary's orders when it seeks recognition of water rights for the disputed lands.

More generally, the United States must initiate an action in ejectment if claimants are in possession of the disputed property or to set aside a patent if one has issued. United States v. Reimann, 504 F.2d 135 (10th Cir. 1974); United States v. Hudspeth, 384 F.2d 683 (9th Cir. 1967). Federal immunity will not bar the review of the federal claims in such instances.

In the pending *First American Title Ins. Co.* survey protest, cited *supra* at p. 35 n. 29, the United States or the Fort Mojave Tribe will eventually have to sue the claimants to quiet title since the parties are in possession of the lands.

United States is deciding how to manage its own lands, and no other party is injured, or when a tribe is already in actual and complete possession of the disputed lands, will review be precluded. But the protection thereby afforded to Indian lands is exactly the outcome Congress desired and provided in the QTA.

CONCLUSION

The Ninth Circuit's decision ordering dismissal of this case should be affirmed.

Dated this 12th day of August, 1988.

Respectfully submitted,

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